IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77- 1540

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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International Business Machines Corporation petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, which is reproduced in Appendix A, has not yet been reported. The Report and Order of the Federal Communications Commission ("Commission") in *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities* (*"Initial Order"*), which is repro-

duced in Appendix B, is reported at 60 F.C.C.2d 261 (1976). The Commission's Memorandum Opinion and Order on reconsideration in the same matter, which is reproduced in Appendix C, is reported at 62 F.C.C.2d 588 (1977).

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1978. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

"Resellers" buy telephone transmission services from regulated telephone companies and resell them to the public, but do not themselves operate transmission facilities. The Commission found that the resale business is inherently competitive and has no natural monopoly or essential public service attributes. However, it concluded that resellers fall within the definition of "common carriers" of communications in the Communications Act of 1934 (the "Act") and that it must therefore regulate them as public utilities. The questions presented are:

1. Whether the Commission is compelled to regulate as common carriers all entities that may fall within the definition of that term in the Act, and has no discretion to forbear from regulating if it determines that forbearance will further the policies of the Act.

2. Whether the Commission's jurisdiction under Title II of the Act to regulate communications common carriers extends to resellers.

STATUTORY PROVISIONS INVOLVED

Section 3(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 153(a), provides:

> "'Wire communication' or 'communication by wire' means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."

Section 3(h), 47 U.S.C. § 153(h), provides in pertinent part:

> "'Common Carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy . . . ."

STATEMENT OF THE CASE

A "reseller" is an entity that buys private line services from a regulated telephone company or other common carrier and resells them to the public.[1] Resellers generally buy these services from the telephone companies in bulk and resell them in small quantities, much as wholesalers do in other fields. Many of them combine the transmission services with data processing or other added services desired by their customers.[2] Resellers do not operate the wires or other transmission facilities that carry and route the messages. The telephone companies continue to perform the actual transmission function.

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[1] Private line telephone services are special services used chiefly by government and business. Unlike ordinary telephone service, which enables each customer to call any other customer in the nationwide network, private line services provide access to a more limited number of points, between which the customer may need frequent communications.

[2] *Initial Order*, 60 F.C.C.2d at 272-74, App. B at 20b-25b.

The Commission's Decision.

Prior to the Commission's orders in this case, the telephone companies' tariffs generally prohibited subscribers to their private line services from reselling those services to others. In 1974, the Commission began an inquiry into the lawfulness of these restrictions, asking two questions: (1) whether subscribers should be free to resell private line services; and (2) if so, whether and to what extent the Commission should regulate the resale.[3]

In its Initial Order, the Commission held that the tariff restrictions that had barred resale were unjust, unreasonable, and unlawfully discriminatory.[4] The Commission found that the public interest would be served by giving customers the choice of buying transmission services either directly from the telephone companies or through resellers.

The Commission found that "competition in the resale market may be an inherent characteristic, given, *inter alia*, the apparent absence of a need for substantial investment." [5] It also found that "none of these [resale] activities, either separately or collectively, now exhibits substantial economies of scale or other natural monopoly or essential public service characteristics . . ." [6] and that "[t]he natural tendency of the resale market will be to minimize the opportunity for one firm to charge excessive rates." [7]

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[3] *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, Notice of Inquiry and Proposed Rulemaking*, 47 F.C.C.2d 644, 656-57 (1974).

[4] *Initial Order*, 60 F.C.C.2d at 264-65, 282-89, App. B at 6b-8b, 39b-52b.

[5] *Id.* at 309, App. B at 88b.

[6] *Id.* at 301, App. B at 74b.

[7] *Id.* at 309 n.86, App. B at 89b n.86.

Nonetheless, the Commission held that it is required by the Act to regulate resellers as "common carriers." It ruled that they fit the definition of "common carrier" in the Act [8] and that it has no discretion to decline to impose on them the public utility regulation scheme of Title II of the Act.[9] Although the Commission previously had held that it has power to forbear, where it deems appropriate, from imposing regulation under Title II, it concluded that this Court's decision in *FPC* v. *Texaco*, 417 U.S. 380 (1974), now prohibits such forbearance by any federal agency.[10] As a result, the Commission gave no consideration to whether regulatory forbearance in this instance was in the public interest. It believed it was required to apply to resellers the entry, exit, and rate regulation provisions of Title II, suggesting only that it would seek to relax some of the showings required for entry.[11]

The Decision Below.

The court below upheld the Commission's ruling that resellers must be regulated as communications common carriers.[12] The court rejected petitioner's contention that the definition of "common carrier" includes only entities that, unlike resellers, perform the actual "trans-

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[8] *Id.* at 304-08, App. B at 79b-87b.

[9] *Id.* at 311-16, App. B at 92b-101b. Title II regulates the entry and exit of common carriers, requires them to file tariffs stating their rates and practices, and subjects their activities to comprehensive supervision by the Commission. 47 U.S.C. §§ 201-22.

[10] *Initial Order*, 60 F.C.C.2d at 313-14, App. B at 96b-97b.

[11] *Id.* at 311-12, App. B. at 92b-93b.

[12] The court also rejected challenges by the telephone companies and others to the Commission's decision to permit resale. In the proceedings below, petitioner supported the Commission's conclusion that the former tariff prohibitions on resale were unlawful, in addition to seeking review of the Commission's ruling that it must regulate resellers as common carriers.

mission" of communications. The court apparently concluded that entities who merely "forward" messages to be transmitted by another are also communications common carriers. On that basis, the court held that resellers fall within the Commission's Title II jurisdiction.[13]

The court below also rejected petitioner's contention that the Commission has power to forbear from regulating resellers and should have considered whether and to what extent forbearance is appropriate in these circumstances. The court recognized that the Commission has "broad discretion in choosing *how* to regulate."[14] But, relying on *FPC* v. *Texaco*, *supra*, the court held that the Commission lacked "discretion to choose whether to regulate."[15]

REASONS FOR GRANTING THE WRIT

A. This Case Presents an Important Federal Question Not Previously Determined by This Court Concerning the Power of the Federal Communications Commission to Forbear from Imposing Common Carrier Regulation.

This case raises an important federal question not previously determined by this Court: Whether, where a statute can be read to authorize public utility regulation, a federal agency is compelled automatically to impose such regulation on entities whose regulation will serve no public purpose and will not promote the policies

[13] Slip op. at 6548, App. A at 17a-18a.

[14] *Id.* at 6549, App. A at 19a (emphasis in original).

[15] *Id.* Petitioner believes that the court's decision that resellers must be regulated as public utilities will result in unnecessary burdens and barriers to entry in the offering by resellers of specialized communications and data processing services. As a large user of communications services and a supplier of data processing equipment used with those services, petitioner will be harmed by the inhibition of innovation in this area.

of the statute. The Commission and the court below have held that, in such circumstances, the Commission may not exercise its informed discretion to forbear from imposing regulatory controls. That holding seriously undercuts the Commission's ability to tailor the use of its regulatory power to the demonstrated need for it. It is inconsistent with sound public policy and the effective administration of the Communications Act, for it compels the Commission to impose onerous regulation where the purposes of the Act do not require it.[16]

Petitioner does not seek a ruling that the courts will substitute their judgment for that of the Commission on the policy question whether regulating resellers is in the public interest. Nor does petitioner seek a ruling that the Commission should have followed a procedure different from the one it employed. Our contention is that, through an error of law, the Commission failed to decide a policy question central to the matter before it. The relief we seek is a remand to permit the agency to consider that policy question.

Both the court below[17] and the Commission[18] relied on *FPC* v. *Texaco*, *supra*, as a principal basis for their conclusion that the Commission lacks power to forbear.[19]

[16] Commissioner Glen O. Robinson, dissenting, remarked that the Commission's decision reflects "the regulators' professional bias for regulation," and offered this analogy:

> "When I was in the Army, there used to be a saying: if it moves, salute it; if it doesn't move, paint it. In this branch of government, we proceed according to a slightly different maxim: if it moves, regulate it; if it doesn't move, kick it—and when it moves, regulate it." *Initial Order*, 60 F.C.C.2d at 340-41, App. B at 156b.

[17] Slip op. at 6550, App. A at 19a.

[18] *Initial Order*, 60 F.C.C.2d at 314, App. B at 97b.

[19] Thus, this is not a case where the court merely affirmed an agency's longstanding interpretation of its organic statute. *Cf. Red*

Both erroneously read that case as establishing a broad general rule that federal agencies may not forbear in any circumstances from exercising regulatory authority. That misreading of this Court's decision magnifies the importance of this case beyond the Communications Act and the regulatory status of resellers. The decision below, if left standing, may severely limit the ability of all federal regulatory agencies to exercise their powers prudently and flexibly.

FPC v. *Texaco* did not hold that federal regulatory agencies may not forbear in any circumstances. In that case, the Court invalidated a rule adopted by the Federal Power Commission ("FPC") that permitted small, independent natural gas producers to set their prices for

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Lion Broadcasting Co. v. *FCC*, 395 U.S. 367, 381 (1969). To the contrary, in several previous cases, the Commission had construed the Act as giving it broad forbearance power. For example, it concluded in one case that:

> "[W]e are not required to assert and exercise such jurisdiction merely because we might construe the activity as one which could be encompassed within the intent of the Communications Act of 1934. . . .
>
> "It appears to us that in reaching a decision as to how we are to exercise our discretion, we should look to the basic purpose of regulatory activity in the context of our general national policy, as well as the specific statutory guidelines given this agency. . . . Government intervention and regulation are limited to those areas where there is a natural monopoly, where economies of scale are of such magnitude as to dictate the need for a regulated monopoly, or where such other factors are present to require governmental intervention to protect the public interest because a potential for unfair practices exists."

Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities, 28 F.C.C.2d 267, 297 (1971), *aff'd*, 34 F.C.C.2d 557 (1972), *aff'd in part and rev'd in part sub nom. GTE Service Corp.* v. *FCC*, 474 F.2d 724 (2d Cir. 1973) (footnote omitted). *See also Inquiry Relative to the Future Use of Frequency Band 806-960 MHz, Second Report and Order*, 46 F.C.C.2d 752, 763-64 (1974), *modified*, 51 F.C.C.2d 945 (1975), *aff'd sub nom. NARUC* v. *FCC*, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976).

sales of natural gas to regulated pipelines solely on the basis of market conditions. The Court recognized that the FPC, in meeting its statutory duty to assure the reasonableness of rates set by small producers,[20] could properly choose to control those rates indirectly rather than directly. But the Court held that the FPC could not allow market price to be the sole measure of reasonableness, because the legislative history of the Natural Gas Act revealed that such exclusive reliance on market price " 'would [have] contradict[ed] the basic assumption that has caused natural gas production to be subject to regulation . . . .' " [21] The Court repeatedly emphasized that its decision was mandated by legislative findings that conditions in the industry made regulation of such prices necessary.[22]

Unlike the situation addressed in *FPC* v. *Texaco*, nonregulation of resellers cannot undermine the protection afforded the consumer by the Communications Act. The Commission found that "[t]he natural tendency of the resale market will be to minimize the opportunity for one firm to charge excessive rates." [23] The consumer can

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[20] Natural Gas Act §§ 4, 5, 15 U.S.C. §§ 717c, 717d.

[21] 417 U.S. at 398, *quoting FPC* v. *Sunray DX Oil Co.*, 391 U.S. 9, 25 (1968).

The Court's reliance on *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), emphasizes this point. In *Phillips*, the Court held that the FPC had jurisdiction over independent natural gas producers who did not engage in the interstate transmission of gas, but rather sold their gas to transmission companies for resale. The Court reasoned:

> "[T]he rates charged may have a direct and substantial effect on the price paid by the ultimate consumers. Protection of consumers against exploitation at the hands of natural-gas companies was the primary aim of the Natural Gas Act." *Id.* at 685.

[22] The Court said, "we bow to our perception of legislative intent." 417 U.S. at 400.

[23] *Initial Order*, 60 F.C.C.2d at 309 n.86, App. B at 896 n.86.

always buy telephone service from the resellers' competitors—the telephone companies, whose rates are fully regulated. Thus, Commission forbearance from directly regulating resellers would not mean that market prices would be the exclusive determinant of the reasonableness of their rates, because the fully regulated rates of the telephone companies would determine to a significant degree the rates charged by resellers.[24] In effect, forbearance from direct rate regulation of resellers would simply mean that the rates for the same service would not be regulated twice.

The court below seems to have recognized the wisdom of giving the Commission flexibility in formulating its substantive regulatory policy. Thus, the court ruled that the agency has "broad discretion in choosing *how* to regulate."[25] But the court held that the Commission may not choose "whether to regulate" and that "'the Act ". . . imposes certain obligations upon all carriers, and upon the Commission, which cannot be shirked . . . ."'"[26] If this ruling requires the Commission to impose on resellers the basic elements of entry, exit, and rate regulation, as it apparently does, then it will effectively deprive the Commission of the very flexibility the court said the Commission requires. It will substantially constrict the Commission's freedom to reach appropriate substantive policy decisions within its area of expertise. *See Vermont Yankee Nuclear Power Corp.* v. *Natural*

[24] As a practical matter, the reseller must set a rate for its services somewhere between the lower rate (which is regulated by the Commission) charged by the telephone companies for the bulk transmission services resellers buy from them and the higher rate (which is also regulated by the Commission) charged by the telephone companies for nonbulk transmission services bought by "retail" users.

[25] Slip op. at 6549, App. A at 19a (emphasis in original).

[26] *Id.* at 6550, App. A at 19a, *quoting Initial Order*, 60 F.C.C.2d at 313-14, App. B at 96b.

Resources Defense Council, Inc., 46 U.S.L.W. 4301 (U.S., April 3, 1978).

As noted above, we are not asking the Court to review a substantive policy decision reached by the Commission or the procedures it employed. We seek only a ruling that the Commission had authority to consider the basic policy question of whether to forbear from regulating. It would then be for the Commission to make that policy decision.

B. The Decision Below Creates a Conflict in the Circuits.

The question of the Commission's power to forbear requires resolution by this Court, not only because it is important, but also because the ruling below conflicts with decisions of the District of Columbia and Ninth Circuits. Petitioner's briefs in the court below cited these contrary appellate decisions, but the court did not refer to them in its opinion.

In *Philadelphia Television Broadcasting Co.* v. *FCC*, 359 F.2d 282 (D.C. Cir. 1966), the District of Columbia Circuit upheld the Commission's refusal to impose common carrier regulatory controls on community antenna television systems, which the court assumed were common carriers for purposes of decision. The effect of this holding was to permit the Commission, in its discretion, to forbear from imposing *any* of the Title II regulatory regime on a class of presumed common carriers. The same court recently cited *Philadelphia Television* with approval as holding that "a part of the broad discretion allowed the Commission under the Act involves the power not to exercise particular authority which it has been granted." *NARUC* v. *FCC*, 533 F.2d 601, 620 n.113 (D.C. Cir. 1976). The court again registered its view that "there may be arguments for allowing the Commission to decline to exercise its statutory powers . . . ." *Id.*

In *American Civil Liberties Union* v. *FCC*, 523 F.2d 1344 (9th Cir. 1975), the Ninth Circuit upheld a Commission decision to refrain on an interim basis from imposing common carrier controls on providers of cable television access channels, even though both the court and the Commission assumed that such providers might be considered common carriers. In that case, the Commission had concluded that the absence of such regulation would better promote the development of access channel use. In *NARUC*, *supra*, the District of Columbia Circuit characterized that decision as "holding that the Commission had discretion to refuse to exercise its common carrier regulatory powers . . . ." 533 F.2d at 620.[27]

Both *American Civil Liberties Union* and *NARUC* were decided after this Court's ruling in *FPC* v. *Texaco*. Those decisions cannot be squared with the holding below that *Texaco* forbids any federal agency to forbear from exercising its regulatory authority. Thus, the conflict among the circuits centers on the proper reading of this Court's *Texaco* decision.

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[27] The courts also have upheld decisions of other federal agencies declining to impose statutorily authorized regulation on entities within their jurisdiction. In *Pan American World Airways* v. *CAB*, 392 F.2d 483 (D.C. Cir. 1968), the Civil Aeronautics Board concluded that, although it had jurisdiction over certain foreign tour operators, it could and would decline to exercise such jurisdiction because the imposition of controls would not serve the public interest. The District of Columbia Circuit, agreeing that the Board had jurisdiction, upheld the Board's decision not to invoke that jurisdiction. *Id.* at 490, 495-96.

The National Labor Relations Board also has carved out from its jurisdiction particular areas which as a matter of policy discretion it has chosen not to regulate. For example, the Board will not exercise its jurisdiction over certain infractions which arise in connection with firms whose annual revenues do not exceed a floor established by Board rules. This Court has long recognized without disapproval the practice under which the Board "has never exercised the full measure of its jurisdiction." *Guss* v. *Utah Labor Board*, 353 U.S. 1, 3 (1957).

The issue on which this conflict exists is obviously important for the administration of the Communications Act—and, in view of the broad holding below, of other federal regulatory laws as well.

C. This Case Presents an Important Question Concerning the Extent of the Commission's Jurisdiction Under Title II of the Communications Act.

This case presents the important question whether Title II of the Act should be read to authorize public utility regulation of entities that do not own or operate any transmission facilities for hire but merely buy and resell the transmission services of regulated telephone companies. The Commission's conclusion that Title II applies to resellers, which the court below upheld, extends the statute far beyond the contemplation of Congress. This question of the scope of a federal agency's jurisdiction is highly appropriate for Supreme Court review.

The language of the Act does not permit the conclusion that resellers are communications common carriers. In reaching the conclusion that they are, the Commission and the court of appeals ignored a critical element of the Act's definitional scheme. The statute requires that a "common carrier" subject to the Act not only offer services that relate to communications, but also engage in the "transmission" of messages.[28] Resellers do not meet this

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[28] A common carrier is an entity engaged in interstate "communication by wire or radio or . . . radio transmission of energy . . . ." Section 3(h), 47 U.S.C. § 153(h). Section 3(a) of the Act, 47 U.S.C. § 153(a), defines "communication by wire" as

> "[T]he *transmission* of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." (Emphasis added.)

The statutory definitions of "communication by radio" and "transmission of energy by radio" in Sections 3(b) and (d), 47 U.S.C.

test because they do not themselves perform any transmission function. They merely buy transmission services from telephone companies and resell them, often combining them with special data processing or other functions.[29]

The conclusion that entities that do not engage in "transmission" are not communications common carriers under the Act is confirmed by a series of decisions under the Interstate Commerce Act[30] relating to freight forwarders. As the Commission recognized,[31] freight forwarders perform a "resale" function in the transportation context that is similar to the function of communications resellers.[32] This Court and the ICC held that freight forwarders were not common carriers within the Interstate Commerce Act because they did not, as the definition in the Act required,[33] provide the actual "transportation."[34] Congress based the Communications Act directly on the Interstate Commerce Act; and it derived the definitions in the Communications Act quoted above directly from the definitions which this Court had construed not to include forwarders.[35]

The court below dismissed the Interstate Commerce Act decisions as inapposite, relying on a dissimilarity in the wording of the definitions in the two statutes.[36]

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§§ 153(b), (d), also require actual "transmission." Thus, an entity is not a communications common carrier under Sections 3(a), 3(b), 3(d), and 3(h) unless it actually engages in the transmission of messages.

[29] This does not mean that the Commission is necessarily powerless to control the practices of resellers. This Court has held that the Commission may exercise "ancillary" authority over entities not directly within its jurisdiction, to the extent necessary "to the effective performance of [its] various responsibilities . . . ." *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). The Commission has not made the findings necessary to invoke that authority here. Those findings would include a determination that regulation of resellers is needed and is reasonably ancillary to the Commission's express power over those who actually transmit communications for hire.

[30] 49 U.S.C. § 1 *et seq.*

[31] *Initial Order*, 60 F.C.C.2d at 281, 284 n.63, 305, App. B at 37b-38b, 42b n.63, 80b.

[32] Freight forwarders buy transportation from railroads and make bulk rates available to individual shippers by assembling small shipments into larger ones; but the forwarders do not do the transporting. The railroads actually transport the shipments to their destination.

[33] 49 U.S.C. §§ 1(1), 1(3)(a).

[34] *ICC* v. *Delaware, L. & W. R.R.*, 220 U.S. 235 (1911); *Great Northern Ry.* v. *O'Connor*, 232 U.S. 508 (1914); *Lehigh Valley R.R.* v. *United States*, 243 U.S. 444 (1917); *Merchants Warehouse Co.* v. *United States*, 283 U.S. 501 (1931); *Freight Forwarding Investigation*, 229 I.C.C. 201, 302-04 (1938); *see United States* v. *American Railway Express Co.*, 265 U.S. 425, 432 (1924) ("The natural meaning of the term carrier by railroad is one who operates a railroad, not one whose shipments are carried by a railroad").

The ICC reached the same result in construing its authority to regulate "common carriers by motor vehicle" under the Motor Carrier Act, 49 U.S.C. § 301 *et seq. See Acme Fast Freight, Inc., Common Carrier Application*, 8 M.C.C. 211, 216, 217-21 (1938), *aff'g in part and rev'g in part on other grounds*, 2 M.C.C. 415 (1937), *aff'd, Acme Fast Freight, Inc.* v. *United States*, 30 F. Supp. 968 (S.D.N.Y.), *aff'd per curiam*, 309 U.S. 638 (1940); *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344 (1940).

Freight forwarders continued to be free of such regulation until the Interstate Commerce Act was amended in 1942 and in 1950 to include forwarders expressly as common carriers within the ICC's jurisdiction. 49 U.S.C. § 1001 *et seq., as amended by* Act of May 16, 1942, c. 318, 56 Stat. 284 (1942); 49 U.S.C. § 1002(a)(5), *as amended by* Act of December 20, 1950, c. 1140, 64 Stat. 1113 (1950). *See also Chicago, M. St. P. & P. R.R.* v. *Acme Fast Freight, Inc.*, 336 U.S. 465 (1949).

[35] *See* S. Rep. No. 781, 73d Cong., 2d Sess. 2 (1934); H.R. Rep. No. 1850, 73d Cong., 2d Sess. 5 (1934).

[36] The Communications Act definitions include "forwarding" among the incidental activities of a common carrier that are subject to regulation. Sections 3(a), (b), (d), 47 U.S.C. §§ 153(a), (b), (d). In contrast, the "incidental" clause in the Interstate Commerce Act definition does not mention forwarding. But this Court long ago held that the activities listed in the "incidental" clauses are subject to regulation only when provided by an entity that is al-

That reasoning ignores Congress' direction that the two statutes are to be construed identically, despite their minor differences in wording:

> "[Any] variances or departures from the text of the Interstate Commerce Act are made for the purpose of clarification in their application to communications, rather than as a manifestation of congressional intent to attain a different objective." [37]

The decision below thus wrongly extends regulation to an important segment of the telecommunications industry, based on a misreading of the jurisdictional definitions in the Communications Act.[38] The error is magnified by the court of appeals' ruling that the Commission must exercise jurisdiction over resellers without considering whether regulation will promote the policy of the Act. Unless corrected, the decision below will subject resellers to regulation without statutory authority or a judgment by a regulatory agency that regulation is desirable.

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ready a common carrier because it does the actual transporting. Performing an "incidental" activity alone does not make one a carrier. *Ellis* v. *ICC*, 237 U.S. 434 (1915).

[37] S. Rep. No. 781, 73d Cong., 2d Sess. 2 (1934). *See also* H.R. Rep. No. 1850, 73d Cong., 2d Sess. 5 (1934).

[38] The Department of Justice has expressed the view that the Act may be interpreted not to regulate resellers, such as so-called "value-added carriers." Commenting in a current Commission proceeding, the Department said:

> "Our review satisfies us that the Commission in this proceeding could legitimately . . . classify all devices and services associated with data processing as 'data processing' for the purposes of its rules, even if to do so might in particular instances classify what alone would be 'communications' devices as 'data processing' devices. Such an approach would have the desirable effect, in our view, for example, of putting many of the new 'value added carriers' beyond the scope of FCC economic regulation. Such firms have few, if any, of the traditional indicia justifying full-fledged common carrier regulation. They do not display 'pervasive scale economies'; the capital investment involved is not unusually high; and the public interest in the maintenance of their services is minimal, since other service alternatives are readily available." Comments of the Department of Justice, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, at 37-38 (F.C.C., filed May 26, 1977) (citations omitted).

That view is irreconcilable with the Department's support in the court below of the Commission's ruling in the present case.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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